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Raymond Calkins.

THE DUNSTER HOUSE BOOK SHOP CASE

2127.94

A STATEMENT

Rec'd SEP 18 1930 B.P.L.

by the Directors of

THE NEW ENGLAND

WATCH AND WARD SOCIETY

OF THE CITY OF BOSTON

BOSTON, JULY, 1930

Raymond Calkins
Sept. 26, 1920

2127.94

Directors

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The Dunster House Book Shop Case

The Dunster House Book Shop case presents a strange contradiction. On the one hand, it was one of the simplest cases with which the New England Watch and Ward Society ever had any connection. It offered no difficulties in either judgment or method. Yet as it developed, it became one of the most famous cases in the annals of the society, exciting a nation-wide interest, and arousing a storm of criticism and satirical comment on the motives and methods of our organization.

In the month of January, 1929, a complaint was received from a Boston book dealer that a certain book was being sold in Boston. Investigation failed to disclose any sales, and the matter was dropped.

On October 11th evidence was received from New York that the proprietor of the Dunster House Book Shop in Cambridge had purchased five copies of the book. Subsequent events are reported in the opinion of the Supreme Judicial Court as follows:

"An investigator for the Watch and Ward Society, a private association, in October, 1929, went to the book shop of which the defendant was manager to ascertain if a copy or copies of the book in question were there kept for sale and, if such were the fact, to procure a copy for the purpose of prosecution. He was told by the clerk who waited upon him that the book which he described was not carried in stock; that they did not consider it advisable to carry it in stock; but that if he wanted it they would try to get it if he would give an order, and that the price would be $15.00.

"The next day the investigator returned to the shop and told the clerk he would be willing to order the book; he there saw the defendant, who said to the clerk, 'Take his name and address, and we will try to get it for him.' . . . Later in the same month the investigator learned by telephone that the book had been received and was ready for delivery, and on October 30th, 1929, the book was delivered to him by the clerk on the payment of $15.00." . . .

That the book was flagrantly obscene was admitted by counsel for the defense and was the subsequent verdict of three courts.

It was also admitted by counsel for the defense that the defendant had already sold five copies of the book at a

profit of 200% to himself. This was not therefore a "snooping case", as it has been contemptuously mis-termed. It was an effort to secure evidence in the only way in which evidence can be secured which will hold in the courts, in a case in which an offense against statute law had already repeatedly been committed.

Prosecution of the case followed and on November 25th, the trial was concluded in the Third District Court, East Cambridge, Mass., Judge Stone sitting. In passing sentence Judge Stone said in substance, "This is the worst book I have seen in my twenty-five years experience as a judge. As for the methods employed in buying the book, they were the only methods that could be successfully employed in a case like this. I say that in this instance the New England Watch and Ward Society has rendered a service to the community." The defendant was convicted and sentenced. In this lower court trial the Dunster House Book Shop proprietor, under oath, disclaimed any recollection of having previously handled the book at all. He even testified that he would not know where to get the book.

The trial in the lower court excited little public interest or comment. Its report in the newspapers was confined to a few paragraphs. There was no public interest of any kind. When the case was taken on appeal to the Superior Court, however, it suddenly burst into prominence.

The counsel for the defense, seeing that it was not possible to deny that the book was obscene, or that it had been sold, sought the acquittal of their client on the ground that he had been entrapped into selling it, and that the methods employed by the agent of this society in inducing the sale should cause the defendant to be exonerated. This idea lay behind a vigorous denunciation of the society by counsel for the defense.

In addition, the District Attorney, who was prosecuting the case, caused a sensation by making a savage attack on our organization which had furnished him with the evidence on which he prosecuted, announcing that he would proceed against the society on the ground of "criminal conspiracy" in case it so acted again. To take advantage of the three court hearings of the case in which he participated as a public officer, and at which the society was not represented or able to reply, as occasions for abusive attack is a procedure the propriety of which has been publicly questioned by others besides ourselves. During the entire period that this

case has been in the courts, Mr. Bushnell has lost no opportunity outside of the courts, before legislative committee hearings and by contributions to publications to disparage our work and to belittle the intelligence of our officers.

Because of these sensational attacks on our organization, what had been an obscure case became a front-page newspaper sensation. We wish to emphasize the fact that the press reports up to this point were routine and insignificant. The responsibility for the ensuing publicity must be laid upon the sensational methods adopted by the counsel for the defense and the District Attorney in the Superior Court trial. Until that moment the case had not attracted any public attention.

Then there began upon the part of at least two prominent Boston newspapers a venomous attack upon the society, which for bias, prejudice, disregard of fact, and total absence of any sense of justice and fair dealing has rarely been duplicated in recent American journalism.

These papers—notably the *Boston Herald*—fanned popular feeling, denounced the Board of Directors and called upon them to resign, garbled the news, and brought to bear every possible influence and pressure to disrupt the organization and to discredit its officers. These press misrepresentations at last reached the point where the most venomous critic of the society editorially claimed that it had not been vindicated by the decision of the Supreme Court, which held on all the facts, that "the defendant was not induced to sell the book by any decoys or false allurements of the agents of the Watch and Ward Society." During the entire campaign this newspaper had claimed that the sale had been induced solely by the improper activities of the society.

Among other methods pursued in the effort to bring the society into disrepute was the effort to cause a stampede of resignations among the vice-presidents and directors. The public was given to understand that an exodus had begun. Officers of the society were besieged by telephone calls from reporters, often late at night, inquiring if they had resigned or were about to resign; and intimating that others were about to do so. As a matter of fact, not one officer of the society has stated that he resigned as a result of the Dunster House Book Shop case, the facts thus absolutely nullifying the efforts of the Press to mislead the public into believing the claim that there was a disintegration of our organization due to our prosecution of this case.

This society does not object to serious criticism, and it respects the honest opinions of those who do not approve of its policies; but we are forced to record feelings of profound disappointment and indignation at the narrow, vindictive type of journalism which has disgraced the public discussion of its affairs.

While all of this discussion was raging in the papers, the directors refrained from any personal comments, and issued but two public statements. One of these, dated December 24th, assured the public that a careful examination of the methods pursued by its agents had failed to disclose anything either illegal or unethical, and requested it to suspend judgment until the case was out of the courts, when a full defense would be made. The other statement, issued January 13th, corrected the false reports concerning the resignations of officers from this society's board and promised, in view of the wide general interest in the case, that a prominent lawyer, in no way connected with the society, would be retained to make an impartial fact-finding report on the whole conduct of this case by our society.

The attorney selected to do this work was Thomas W. Proctor, Esquire, recognized as one of the leaders of the Boston Bar. He is a past president of both the Boston and Massachusetts Bar Associations and chairman of the Committee of the Boston Bar Association appointed to assist the Attorney General in the Garrett inquiry. His long professional experience has given him exceptional qualifications for analyzing evidence and passing on the credibility of witnesses. Mr. Proctor's report was submitted in writing on March 24th, and it was considered and accepted at a special meeting of the board of directors held on March 31st. It was withheld from publication, under the policy adopted by the society, until the case was out of the courts.

On April 3rd the case came before the Supreme Judicial Court on appeal. The argument for the defense was made by two able attorneys, who endeavored to prove that the sale of the book was secured by entrapment and allurement by the agent of this society, and that on these grounds the verdict against the defendant should be set aside.

The District Attorney of Middlesex County, who had prosecuted the case, made no oral argument. His printed brief was perfunctory and made no reference to the question of entrapment principally relied on by the defendant. A supplementary memorandum, filed by him with the

Supreme Court, April 9th, dealt competently with the issue of entrapment. Even in arguing questions of law before the Supreme Court, however, the District Attorney could not resist irrelevant criticism of the society and in this memorandum he admonished it for undesirable advertising of the book, for which the District Attorney himself was to so large a degree responsible.

A careful reading of the decision of the Supreme Court, which is printed in full as an appendix to this statement, is requested. Especial attention should be paid to the following section of the Court's opinion:

"The contentions upon which the defendant most earnestly relies are found in his requests for rulings number '1A' and '2A' which . . . sought a ruling that the defendant is not guilty because he was entrapped by the agent of the Watch and Ward Society . . . Assuming without decision, that the doctrine of entrapment as above stated is not limited to cases where the entrapment is done or procured to be done by public officers, we think the facts in this case do not show that the defendant within the principle decided was not one who prior to the offense charged had never conceived any intention of committing the offense prosecuted or any such offense in violation of G. L. c. 272 s. 28.

"Indeed the evidence of the defendant himself, that, knowing the nature of the publication, he had procured and sold on five different occasions to five different individuals a copy of the book in question, warranted the trial judge in finding that the defendant had the intention to do what he did do without the allurement of anything beyond a desire for gain from the sale of the book in question and other books, and that he was not induced to sell this book by any decoys or false allurements of the agent of the Watch and Ward Society. . . ."

The society feels that this decision is a complete refutation of the criticism focused against the society on the repeated assertion that the defendant had been entrapped into buying and selling the book by what the Supreme Court characterizes as "decoys or false allurement of the agents of the society." After reviewing all the facts and the law the Supreme Court holds that this contention cannot be sustained and "that the defendant had the intention to do what he did do without the allurement of anything beyond a desire for gain from the sale of the book in question and other books."

On Wednesday, May 28th, the directors made public the fact-finding report of Mr. Proctor, which is printed in full as an appendix to this statement. This report pointed out that it has long been the law in Massachusetts that any person may lodge a complaint in the proper court against any other person that the latter has committed an offense against the law.

On the facts in the case, after studying the stenographic report of all the testimony, the arguments, the findings and rulings of the Superior Court, conferring with the justice who heard the case in the first instance in the District Court and examining thoroughly the witnesses who testified for the prosecution, Mr. Proctor makes the following findings:

1. "I have had no reason to believe or think that any witness for the prosecution made any statement on the stand concerning the occurrences that he did not regard as correct when made."

2. "The suggestion of improper inducement to make the sale is without foundation. It is plain that the offense was committed without urging. If, however, that seems of importance, it may be said that there exists the full confession, in typewritten form, of the principal defendant publicly made, under oath, that he voluntarily, for gain, sold five copies of the same book within five or six weeks previous to the sale here in question. And each sale was an offense under the statute."

3. "There is nothing whatever to indicate that the sale to the witness for the prosecution was anything other than a genuine sale and any claim of previous sale with or by the procurement of anyone connected with the prosecution is utterly without foundation."

4. "In conclusion I have seen nothing in the activities of the agents of the society in this case that was not in the public interest, and in view of the established facts it is obvious that this work done by the society is work that should be continued."

On Thursday, June 5th, on motion of District Attorney Bushnell, argued before Judge Sisk of the Superior Court, a decree was entered remitting the jail sentence and the case was disposed of by payment of a fine of $500.00. The society never expressed any opinion or made any suggestion as to what penalty should be imposed. It is entirely satisfied with the final disposition of the case.

It is justified, however, in commenting upon the questionable propriety of subscriptions which were made to the "Fine Fund" of the defendant in order to relieve the defendant of all penalty for the crime of which, in three trials, he had been adjudged guilty. Such example does not tend to promote respect for our courts.

We desire, moreover, to take continued exceptions to the irrelevant and unfounded criticism which the District Attorney, in the final hearing again directed against the society. To call "brazen effrontery" a statement that the conduct of this case by our society had been vindicated by the Supreme Court decision, is only another illustration of the intemperate use of speech which from the first has characterized everything that the District Attorney has had to say about this organization.

It remains to account for the bitterness of the feeling aroused by this case, and for the sharp criticism of this organization which was seeking only to enforce the statute law enacted by the people for their protection.

In part, this was due to the fact that the defendant in this case was a well-known book collector and dealer. If an obscure dealer had been prosecuted for the same offense, little attention would have been given to the case. It is unfortunate that a man of his standing should have trafficked for large personal profit in a book which he admitted was unfit for sale. The fact that he has many influential friends certainly did not relieve this organization from its duty in seeing that the law was impartially observed and enforced.

Resentment against any form of prohibition, whether of free speech, of liquor or of literature, also entered into the feeling of many persons. Yet the community has no other adequate way of protecting itself than by statute law, and laws enacted by the people in the interest of public welfare must be respected. Any organization which seeks their enforcement, however, is bound to incur, for the reason stated, a large measure of unpopularity.

Many persons feel that it is unreasonable and unwise to seek to prevent adults from reading any books which they desire to read. The difficulty, however, lies in keeping books which are thus sold to adults out of the hands of adolescents and others to whom they might be injurious. This is only one illustration of the necessary surrender of many personal

rights which the individual accepts in the interest of society as a whole. Personal liberty must always be relative when one lives in relation with others.

Still other people—many of them disinterested—detest detective methods and espionage of any kind. These are not congenial to anyone. Yet the fact remains that there is no other method by which offenders against certain laws can be reached and evidence obtained which will hold in a court of law. Were these methods—those regularly employed by official authorities—to be abandoned in the war on vice, another element in the community less reputable than our critics would be very much relieved.

This subject is well covered in the following letter from Doctor Endicott Peabody, Headmaster of Groton School, one of our vice-presidents:

> "Personally I dislike the use of detectives. It seems impossible at this stage of the game, however, to do without them when one is dealing with malefactors. If money is being stolen in some business office, the proprietors are in the habit, I take it, of setting several persons to watch those who are suspected; they mark money and leave it in a likely place. When the dishonest employee has been discovered he is promptly punished by the courts and the methods of the business office are justified. They are, in fact, so much a matter of course that they are never called in question.
>
> "It seems to me that the use of private detectives on the part of the Watch and Ward Society stands on the same basis. The only difference appears to be that people generally condemn financial dishonesty, while many are comparatively indifferent to the corruption of youth. The latter appears to some of us as infinitely more dangerous to the community."

Finally there are those who feel that there is no place in the community for a private organization which seeks to discover and to prosecute law-breakers and that this work should be left to the police. They suspect incompetency and arrogance when it is performed by a self-constituted body of private citizens.

The answer to this objection has been well stated by Mr. Joseph Lee, another of our vice-presidents, whose extensive record of public service gives his words special weight:

> "A District Attorney is not expected to discover and examine into every offense that is committed; he has neither the time nor the necessary assistance for that purpose. If private citizens should withhold their service in this matter our legal system would largely cease to function. In a certain class of cases the effective discharge of this duty of the private citizen requires organization, not to usurp the functions of the police, of the District Attorney or of the courts, but effectively to supplement their action. But the general condemnation of the Society upon the

assumption that no such organization should exist, is based upon a misapprehension of the facts. If the Watch and Ward Society were to be dissolved tomorrow, a similar agency would have to be created in its place."

That this Society has done its difficult and delicate work with judgment and ability is shown by over fifty years of useful service and continuous public support. That it does not deal in doubtful cases is proven by the fact that it has won not less than ninety-eight percent of the cases it has tried in the courts during the past ten years. To this impressive list is now added this famous case, which has been won in spite of the most determined opposition and in the face of calumny and abuse.

The New England Watch and Ward Society will continue to do its work in the future as in the past, believing that the public at large appreciates its importance and the disinterested purpose which underlies all that it seeks to do. Any one who will take the trouble to read our Annual Report will see that repressive cases such as this are but a small part of our activities, which in the main, are constructive and preventive efforts to maintain the moral standards and the welfare of the community.

APPENDIX A

SUPREME COURT OPINION

COMMONWEALTH *v.* JAMES A. DELACEY.

MIDDLESEX. May 27, 1930.

PIERCE, J. This is a complaint in a district court, under G. L. c. 272, s. 28, which reads: "Whoever imports, prints, publishes, sells or distributes a book . . . containing obscene, indecent or impure language, or manifestly tending to corrupt the morals of youth . . . or introduces into a family, school or place of education, or buys, procures, receives or has in his possession any such book . . . either for the purpose of sale, exhibition, loan or circulation or with intent to introduce the same into a family, school or place of education, shall be punished by imprisonment for not more than two years and by a fine of not less than one hundred nor more than one thousand dollars." The defendant was convicted in that court; he appealed to the Superior Court and at the trial there, held without a jury, was convicted and sentenced to pay a fine and to serve a term of imprisonment in the house of correction. The case comes before this court on the defendant's exceptions to the denial of certain requests for rulings by the trial judge. The bill of exceptions contains everything material to the issues therein involved.

The book, which was introduced in evidence by the Commonwealth at the trial in the Superior Court, was produced at the hearing before the full court for its consideration as if it were a part of the bill of exceptions. The defendant concedes in his brief that whatever the standards of literature may have been in the past or whatever may be the standards in the future "it is clear that according to present standards the book is not fit for publication or circulation." Commonwealth v. Buckley, 200 Mass. 346. Commonwealth v. Allison, 227 Mass. 57, 61, 62. On this subject, the conclusion of fact we have reached upon a full reading of this book is in accordance with that of the trial judge, which he formulates as follows: "the book viewed as a whole, having regard to its significance as an entity, and not merely to certain particular parts of it viewed separately, is obscene, indecent and impure, and manifestly tends to corrupt the morals of youth." Commonwealth v. Buckley, supra. The

several passages of this book when read by themselves alone and out of context also warranted the trial judge in his finding that they are obscene, indecent and impure, and manifestly tend to corrupt the morals of youth, and when so read have these baneful attributes in an even more concentrated degree than when diluted by admixture with the rest of the writing.

The defendant is the manager of a book shop in Cambridge and his customers include literary people and book collectors. He had previously had many requests for copies of the book in question from members of the faculty of colleges, from a member of the legal profession, and from collectors of the author's manuscripts and first editions of his books. The book in question was published in 1928. The defendant never had copies of it on sale. In August, 1929, he procured five copies at $5 each for men who had asked him for the book, and sold them to these men at $15 a copy. He had never read it through, but was fully familiar with the reviews of it; he knew the substance of it and did not consider the book fit to sell; he knew what he was putting out and could not defend the book.

The circumstances which led to the delivery of the book on the facts reported in substances are as follows: an investigator for the Watch and Ward Society, a private association, in October, 1929, went to the book shop of which the defendant was manager to ascertain if a copy or copies of the book in question were there kept for sale and, if such were the fact, to procure a copy for the purpose of prosecution. He was told by the clerk who waited upon him that the book which he described was not carried in stock; that they did not consider it advisable to carry it in stock; but that if he wanted it they would try to get it if he would give an order, and that the price would be $15. The next day the investigator returned to the shop and told the clerk he would be willing to order the book; he there saw the defendant, who said to the clerk "Take his name and address, and we will try to get it for him." He gave as his name his first and middle names. He did not give his full name because he "didn't want them to know or tie . . . (him) up with the Watch and Ward Society." He concealed his connection with it so that the clerk and the manager would go through with the sale.

The talk of the investigator at the first interview with the clerk was to the effect that he was interested in books—

he intended to intimate that he was a book buyer and was in that store as an ordinary person really interested in books. He was in fact interested in prohibited literature, with an intent to find out whether the clerk or the manager would sell him a prohibited book. Later in the same month the investigator learned by telephone from the manager that he had received the book, and on October 30, 1929, the book was delivered to him by the clerk on the payment of $15. It is the contention of the defendant that on the facts disclosed in the bill of exceptions there was no sale of the book; that is, that the defendant acted as an agent in procuring it for the investigator. This contention does not merit serious consideration. The book was procured by the manager for the purpose of a sale to the investigator if that person should elect to take the book and pay the price of it. In nowise does the testimony of the manager show an agreement that he or his clerk should act as a mere conduit in the transfer of title, or that the book when procured should be the property of the investigator subject to a lien for the money which the manager should advance in behalf of his alleged principal.

The contentions upon which the defendant most earnestly relies are found in his requests for rulings number "1A" and "2A," which read: "1A. If the court finds that the conception of and the intention to do the acts which the defendant did, did not originate in the defendant's mind or with him but originated in the mind of the complaining witness and were instilled into the defendant's mind by the complaining witness by means of deceitful representations and importunities then the defendant must be acquitted. 2A. If the court finds that the defendant made the alleged sale because of the inducement of an agent or agents of the Watch and Ward Society, and would not otherwise have violated the law, the defendant must be acquitted." More concisely stated, these requests sought a ruling that the defendant is not guilty because he was entrapped by the agent of the Watch and Ward Society. In support of his contention the defendant cites the cases of *Woo Wai* v. *United States,* 223 Fed. Rep. 412; *Sam Yick* v. *United States,* 240 Fed. Rep. 60; *Peterson* v. *United States,* 255 Fed. Rep. 433; *Butts* v. *United States,* 273 Fed. Rep. 35; 18 A. L. R. 143, annotation at 146; *Cermak* v. *United States,* 4 Fed. Rep. (2d) 99, to the effect that no valid and binding prosecution can be had upon a clear case of entrapment, and quotes from *Butts* v. *United States,* 273 Fed. Rep. 35 at

page 38 the paragraph which reads: "But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty."

Assuming, without decision, that the doctrine of entrapment as above stated is not limited to cases where the entrapment is done or procured to be done by public officers, we think the facts in this case do not show that the defendant within the principle decided was not one who prior to the offense charged had never conceived any intention of committing the offense prosecuted or any such offense in violation of G. L. c. 272, s. 28. Indeed the evidence of the defendant himself, that, knowing the nature of the publication, he had procured and sold on five different occasions to five different individuals a copy of the book in question, warranted the trial judge in finding that the defendant had the intention to do what he did do without the allurement of anything beyond a desire for gain from the sale of the book in question and other books, and that he was not induced to sell this book by any decoys or false allurements of the agent of the Watch and Ward Society. In the United States courts the law applicable to the facts which are here admitted by the defendant is stated in the opinion in *Butts* v. *United States,* 273 Fed. Rep. 35, at page 37, to be as follows:

"It is not denied that, in cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution." *Price* v. *United States,* 165 U. S. 311, 315; *Grimm* v. *United States,* 156 U. S. 604, 610; *Goode* v. *United States,* 159 U. S. 663, 669; *Andrews* v. *United States,* 162 U. S. 420, 423. See in accord *Commonwealth* v. *Graves,* 97 Mass. 114; *Regina* v. *Carlile,* 1 Cox C. C. 229. See also to the effect that the competency of evidence in this Commonwealth depends on its inherent, probative value rather than on outside circumstances. *Commonwealth* v. *Donnelly,* 246

Mass. 507; *Commonwealth* v. *Wilkins,* 243 Mass. 356; *Commonwealth* v. *Welch,* 163 Mass. 372.

We find no error in the refusal to give the requested rulings.

Exceptions overruled.

Appendix B

Attorney Proctor's Report

Nason & Proctor
25 Pemberton Square, Boston

March 24, 1930.

The New England Watch and Ward Society,
43 Tremont St., Room 1113,
Boston, Mass.

Gentlemen:

In accordance with your request that I should examine the record in the case recently tried in the Superior Court in Cambridge, inquire into all other available evidence having to do with the activities of the agents of the Society, in connection with the prosecution, and report a summary of the facts, I have made such examination and hand you this report.

Very truly yours,

(*Signed*) Thomas W. Proctor.

To the New England Watch and Ward Society:

I was asked some time ago to examine the facts in the recent case tried in the Superior Court in Cambridge for the violation by the defendants of General Laws Chapter 272, Section 28, and to make a report to you concerning such facts.

Preliminary to such statement of facts it would seem under the circumstances to be not unimportant to state certain settled principles of the law of Massachusetts bearing upon the subject.

In the first place it has long been the law of Massachusetts, speaking generally, that any person whatever (at least competent to be a witness) is a potential complainant in a criminal case. That is, any such person may lodge a complaint in the proper court against any other person, that the latter has committed an offense against the law. There has never been any requirement that a complainant must be a peace officer or policeman.

It has also been the law for seventy-five years, as the reported cases uniformly show, that a person may apply to another to break the law, for the sole purpose of making complaint against the latter that he has broken the law, and of bringing him to justice. The Court, it is true, has expressed the opinion that in such cases the testimony of the complaining witness should be received with distrust and caution, but this warning has no application whatever to the case in hand, as will plainly appear.

That is to say, a person may buy intoxicating liquor of a person who has no legal right to sell it, or may take part in unlawful gambling games for the sole purpose of securing a conviction and straightway make a complaint with the same legal effect as if the evidence were obtained in some other way or by some other person.

So, too, the Supreme Court of the United States has decided that the embezzlement of a so-called decoy letter, made and deposited in the mail for the sole purpose of having it embezzled by a carrier, constitutes the offense as surely as the embezzlement of a genuine letter.

The question in any of these cases is whether or not the law has been violated. Furthermore, it has been declared by the Court that the person buying the liquor, participating in the game, etc., is not an accomplice.

The rule as to a sale of obscene literature is precisely the same. The purchaser may have bought the book for the sole purpose of afterward making a complaint to a court, but will not be held to have been an accomplice.

The testimony and arguments in the trial in the Superior Court and the findings, rulings and judgment of the Superior Court were taken in shorthand and have been transcribed. These have been studied. I have conferred with the justice who heard the case in the first instance in the District Court. I have examined thoroughly the witnesses who testified for the prosecution, but I have not attempted to examine or confer with the accused because it seemed clear that, as the cases had been tried twice and the defendants had testified twice, the last trial being about a month later than the first, it might be assumed that the defendants must adhere to the testimony already fully given.

The character of the book, that was the subject of the inquiry, was conceded on all hands plainly to be within the

prohibition of the statute against the sale of obscene publications.

The principal defendant as appeared from his testimony was a man over forty years of age; he had been from 1915 to 1920 assistant manager of a book store in another state and the manager of the same store from 1920 to July 1927, when he came to Cambridge and undertook the management of a book store in that place, where he had remained, dealing, as he testified, with the faculty, with book collectors and other literary persons.

In August, 1929, as he said, he had procured for persons who had asked him to do so, five copies of the book in question which were shipped to him C.O.D., paying for the five copies the sum of $25. He was then familiar, he said, with the reviews of the book, so that he knew the substance of it. He testified that he could not defend the stuff within the covers of the book. He sold, he said, these five copies to five different persons for $15.00 apiece, making a profit of $10 on each book. This amount of profit, he said, he did not make on ordinary books.

About October 11, 1929, the Secretary of the New England Watch and Ward Society received a communication from the Secretary of the New York Society for the Suppression of Vice, to the effect that the principal defendant's book shop had bought five copies of the book in question. The Secretary consulted with the Directors and was instructed to have an investigation made. He also consulted counsel on the subject. Consequently on October 15, 1929, agents of the Society proceeded to the store of the principal defendant. A sale of the book in question was made to the witness for the prosecution for $15 on October 30, 1929.

In considering this part of the matter there are two questions. The first is whether an offense was committed. All three, the witness for the prosecution, the clerk and the principal defendant, agree that the principal defendant said, "Take his name and address." The witness for the prosecution said, the principal defendant added, "We will try and get it for him." This is denied by the other two.

It is clear, however, that if there were on the part of the defendants no intention to try to procure the book, or no intention at the least to bear in mind the name of the witness for the prosecution, if by any chance the book afterward should be offered to the defendants, there was no

occasion whatever to take his name and address. That is, what would have been done if the intention was to fill the order, as the witness for the prosecution claimed, was done. Then both the clerk and the principal defendant testify to the actual sale.

The examination of the principal defendant on this point by the District Attorney was:

Question: After all, you did at least through your clerk sell this book to (the witness for the prosecution), did you not?"

Answer: Do you call that a sale?

Question: Just let's trace it down. He gave you $15?

Answer: Yes.

Question: Previous to that the book was yours, wasn't it?

Answer: Yes.

Question: You handed the book over to him?

Answer: Yes.

Question: In exchange for his $15 he got the book?

Answer: Yes.

Question: And he walked out with it?

Answer: Yes.

The clerk testified: "Around the first of November I was in the office working at the time and I heard someone come in and it was (the witness for the prosecution). He was alone. I greeted him and asked him if I could help him and he said yes, that he had come for the book in question. I said, 'I told you that we didn't have the book' and he said, 'Yes, but I have been talking to (the principal defendant) and he has gotten a copy of the book for me.' So I said, 'Just a minute' and I went into the office and I told (the principal defendant) that this old man was out there and seemed to think he had a copy of the book for him; and (the principal defendant) says 'I have, and got out of the chair and took the book from a drawer or a shelf in the office, I don't know where, and walked out and handed it to (the witness for the prosecution) and then he went into the other room . . . (The witness for the prosecution) was looking through the book in question . . . and he asked me if I had read it, and I told him 'No' and after glancing

through it he said it was the book he wanted. So I asked him if I could wrap it up for him and he said 'Yes,' so he handed me the book and $15 and I went in the office and wrapped up the book; and while in the office he followed me into the office, and while I was wrapping it up he asked me if he could have a receipt for it and I told him it wasn't a regular transaction and I couldn't give him a receipt for it and we didn't give a receipt for cash sales; so he didn't press the matter any further, but just thanked me and walked out with the package."

Therefore on the sworn testimony of both the defendants there was an actual sale for cash to the witness for the prosecution, as that witness testified, and the offense charged was clearly made out.

It is true that there are minor differences in the testimony of the witness for the prosecution from that of the defendants, which differences might or might not be due to an honest difference of memory. I will not detain you with any extended discussion of these minor differences. It seems to me that it could serve no useful purpose. One incident, however, may be referred to as illustrative. The witness for the prosecution testified that the clerk at the first interview stated that the price of the book would be $15. This the clerk denies. The principal defendant testified that he said to the witness for the prosecution when the book was handed to the latter, "The price is $15," the inference, which might be drawn, being that this was the first time that mention was made of the price. But the Secretary testified that, just before he and the witness for the prosecution entered the shop on October 30, he gave the latter a $10 bill and a $5 bill with which to pay for the book when bought. How comes it that they both knew the price to be paid for the book, if no mention had been made of the price before that occasion?

I have had no reason to believe or think that any witness for the prosecution made any statement on the stand concerning the occurrences that he did not regard as correct when made.

One question remains. It has been hinted, although not directly charged, that somebody in the interest of the prosecution sold the book to the principal defendant, so that he in turn might be induced to sell it to the witness for the prosecution.

In regard to this suggestion it should not be overlooked

that it was not mentioned by the able counsel for the defense at the time of the trial, but seems perhaps to have been inferred by some, from the statement of the principal defendant at the trial, as to how he came into possession of the copy sold. His contention was that he had no copy of the book on October 15. He asserted that the next day after one of his talks on the telephone with the witness for the prosecution (of which telephone talks he said there were two or three, separated by intervals of several days) a young man came into the shop "and at the time I thought I recognized him as a boy who had been there before. He had a copy of the book and said he didn't want to keep it and would I buy it from him. It is the same edition. It was much fresher and newer (than at the time of the trial)—looked more like a new book. Some of the pages were cut, but I couldn't say they were all cut. He said he paid $15 for it and I paid him $15. I have been unable to find that young man since." And on the day following this call of the young man, the principal defendant said, the witness for the prosecution came and the sale was made.

The principal defendant and the clerk testified that on October 15 he had no copy of the book. But they took the witness's name and address. Then this young man the day before the sale came in with a copy "fresher and newer." He was a stranger to the principal defendant, but the price of $15 was paid him for it and the next day the book was turned over to the witness for the prosecution for exactly the same price. That is, the principal defendant bought the book at the high retail price of $15 from an utter stranger and turned it over the next day to another utter stranger for the same price, although he had previously sold five copies of the book and made a profit of $10 on each book. He had never seen the seller since. It is not without interest that the clerk did not testify to seeing the stranger, or to any knowledge of this transaction whatever. Such testimony in defense is very familiar in the courts. A stranger comes from the unknown, performs some exculpating or explanatory act and disappears into the unknown forever.

It may be said that there is nothing whatever to indicate that the sale to the witness for the prosecution was anything other than a genuine sale, and any claim of previous sale with or by the procurement of anyone connected with the prosecution is utterly without foundation.

Furthermore, the suggestion of improper inducement to

make the sale is equally without foundation. It is plain that the offense was committed without urging. If, however, that seems of importance it may be said that there exists the full confession in typewritten form of the principal defendant publicly made under oath that he voluntarily for gain sold five copies of the same book within five or six weeks previous to the sale here in question. And each sale was an offense under the statute.

The result of the trial was that the Court found the defendants guilty and imposed sentence upon the principal defendant who, however, filed exceptions that are still pending.

In conclusion, I have seen nothing in the activities of the agents of the Society in this case that was not in the public interest, and in view of the established facts it is obvious that this work done by the Society is work that should be continued.

(Signed) THOMAS W. PROCTOR.

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